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Hearing Date: 1/__/17 at ___ a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:

919 PROSPECT AVE LLC, Chapter 11

Debtor. Case No. 16-13569 (SCC)

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AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE DECLARING THE AUTOMATIC STAY NOT APPLICABLE WITH RESPECT TO THE CITY'S ONGOING HOUSING COURT LITIGATION PURSUANT TO THE POLICE POWER EXCEPTION TO THE AUTOMATIC STAY

GABRIELA P. CACUCI, an attorney duly admitted to practice before this Court declare as follows under penalty of perjury:

1. I am a Senior Counsel in the office of ZACHARY W. CARTER, Corporation Counsel of the City of New York and its agencies in this matter (collectively, the "City"), including the New York City Department of Housing Preservation and Development ("HPD"), The New York City Department of Health and Mental Hygiene ("DOHMH"), the New York City Department of Finance ("DOF"), the New York City Water Board (the "Water Board"), the New York City Environmental Control Board ("ECB"), and the New York City Department of Buildings ("DOB").

2. I am submitting this Affirmation in support of the City's proposed Order to Show Cause shortening the notice period required by Fed. R. Bankr. P. 4001(a) with respect to motions for relief from the automatic stay and declaring the automatic stay triggered by the Debtor's Chapter 11 filing on December 22, 2016 (the "Petition Date") not applicable or, in the alternative, lifting the automatic stay, with respect to the HPD's pre-petition litigation (the "Housing Court Litigation") against the 919 Prospect Ave LLC (the "Debtor") and its principal Seth A. Miller ("Miller") pursuant to the governmental unit's police power exception to the automatic stay set forth in 11 U.S.C. § 362(b)(4).

3. I have been advised by HPD that two matters are currently scheduled for **January 26, 2017** in the Housing Court with respect to the Debtor and Miller: **(a)** the adjourned return date on HPD's Order to Show Cause to Punish for Civil Contempt and For Civil Penalties in the matter captioned Department of Housing Preservation and Development of the City of New York v. 919 Prospect Avenue LLC and Seth A. Miller, Index No. HP 32940/15, filed because of Debtor's and Miller's failure to cure – for years – hundreds of housing code violations, including immediately hazardous or "C" violations, imminent to the tenants' health, safety and welfare; and **(b)** the trial with respect to the tenants' Article 7A Petition (the "7A Petition") filed on December 3, 2016 for the appointment of an Article 7A Administrator (the "7A Administrator") pursuant to Section 778 et seq. of the Real Property Actions and Proceedings Law ("RPAPL").

4. The Debtor's Chapter 11 filing before this Court on December 22, 2016 and its Notice of Removal of the 7A Petition to the District Court are only this Debtor's and Miller's latest attempts to avoid compliance with, inter alia, Section 27-2124 of Title 27, Chapter 2 of the Administrative Code of the City of New York ("Housing Maintenance Code") and the

imposition of remedies available to the City and the tenants pursuant to Article 19 of the Judiciary Law, Section 5104 of the CPLR, Section 110 of the New York City Civil Court Act and the RPAPL.

5. As set forth in HPD's proof of claim filed on January 12, 2017, $698,460.00 is owed to HPD as of the Petition Date on account of civil penalties for Debtor's and Miller's failure to correct housing code violations pursuant to HPD and Housing Court orders and the Premises are still plagued by hundreds of violations. (A copy of the proof of claim is annexed hereto, with its attachments, as **Exhibit A**.) In support of the proof of claim, HPD submitted the Order to Show Cause signed by Laurie Marin, Judge of the Housing Court on October 20, 2016 and the Affirmation of Jemma An, an attorney at HPD, dated October 18, 2016 (the "HPD Affirmation").

6. Annexed to the HPD Affirmation are the Consent Order signed by the Debtor's management company and so ordered by Michael Pinckney, J.H.C. on December 11, 2015 and the 61-page HPD Open Violations Summary Report as of October 17, 2016, listing 51 Class A, 204 Class B and 103 Class C – immediately hazardous violations. The immediately hazardous violations include failure to repair radiators and provide heat or hot water, failure to repair or abate water leaks in the apartments, failure to repair leaking roof, missing bathtub, sink or wash basin, presence of lead in excess of permissible legal limits in apartments where children under the age of 11 live, obstructed fire escapes, and insect and rodent infested premises.

7. Significantly, the Premises, consisting of 37 apartments, has been plagued with major violations for years and the Debtor, Miller and their management company have failed to cure the violations and make the necessary repairs despite their agreements to do so and the entry of several orders. In fact, Miller – as Vice-President of 6777, submitted the highest and

best bid for the Premises at the bankruptcy auction of the Premises in the earlier case of In re 830 East 163 St. Corp., before Judge Drain. See Order Approving Sale and of Confirmation of Chapter 11 Plan of In re 830 East 163 St. Corp., Ch. 11, Case No. 10-22385 (RDD) (a copy of this Order is annexed as **Exhibit B** hereto). The Premises is known as 919 Prospect Ave LLC a/k/a 830 East 163 St. ACRIS, the DOF-maintained data base of property records in the City of New York, confirms that this Debtor acquired the Premises by Deed dated August 17, 2011 from 830 East 163 St. for $3.7 million. The Debtor now asserts in its Petition that the Premises are worth $5 million. While the "fair market value" of the Premises might have increased since the Debtor acquired it, it is unquestionable that – as reflected in the HPD Open Violation Summary Report – the overwhelming majority of the violations of record were issued against the Debtor and Miller during their ownership of the Premises, subsequent to this Debtor's acquisition thereof in 2011.

8. By 2013, the Premises had so many violations of record that HPD selected the Premises to be part of its Alternative Enforcement Program ("AEP"). (A copy of the AEP list of Properties selected for inclusion in the program as of January 2013, which lists 919 Prospect Avenue) is annexed as **Exhibit C** hereto). See also Landlord Watchlist from Letitia James, the Public Advocate for the City of New York listing the Premises as one of the 20 Worst Buildings in the Bronx.

9. The AEP was created by Local Law 29 of 2007, as amended by Local Law No. 7 of 2011 and provides HPD with the ability to identify the most distressed multiple dwellings for special attention, including the imposition of fees, the issuance of Orders to Correct and the authority to replace building systems if the owner fails to act. Each year, HPD designates 200 different multiple dwellings for participation in the AEP. Property owners can

avoid AEP by correcting and certifying violations in a timely manner and correcting Class C (i.e., immediately hazardous) and Class B (i.e., hazardous) violations before HPD has to step in to correct the conditions. Information about the AEP can be found at nyc.gov/html/hpd/html/owners/aep. The AEP is set forth in Title 27 § 27-2153 et seq. of the New York City Administrative Code (the "Admin. Code").

10. The criteria for inclusion of a multiple dwelling in the AEP is described in the Admin. Code § 27-2153 as follows:

> (i) twenty-seven or more open hazardous or immediately hazardous violations of record which were issued by the department within the two-year period prior to identification of the building for such program; and
>
> (ii) a ratio of open hazardous and immediately hazardous violations which were issued by the department within the two-year period prior to identification of the building for such program that equal in the aggregate five or more such violations for every dwelling unit in the multiple dwelling; and
>
> (iii) unpaid emergency repair charges, including liens, in a ratio of one hundred or more dollars for each dwelling unit in the multiple dwelling which were incurred within the two-year period prior to identification of the building for such program.

Id.

11. On April 9, 2013, HPD issued an Alternative Enforcement Order to Correct with which the Debtor failed to comply. The AEP Order to Correct was subsequently incorporated in the Consent Order dated December 11, 2015 signed by Hon. Pinckney. ("The AEP Order dated April 9, 2013 is hereby incorporated to the instant Consent Order and Respondents acknowledges receipt of the AEP Order dated April 9, 2013").

12. The Consent Order (annexed as part of HPD's proof of claim as ecf # 1-1) required the Debtor and Miller to bring the Premises in compliance with the Multiple Dwelling Law and the Housing Maintenance Code and to correct the violations listed in the May 23, 2015 summary report on the following schedule and imposed penalties as set forth in the Consent Order: Class C ("immediately hazardous") violations within 15 days of the date of the Consent Order or such earlier date as may have been required in the notice of violation concerning lead paint hazards; Class B ("hazardous") within 30 days of the date of the Consent Order; and Class A (non-hazardous) violations within 90 days of the signing of the Consent Order.

13. As described in the HPD Affirmation (¶ 7) in support of its contempt motion (made part of the HPD proof of claim, ecf # 1-1 Part 2), inspections of the Premises by HPD's Division of Code Enforcement on September 16, 2016 established that the Debtor and Miller failed to comply with the Consent Order dated December 11, 2015. The HPD Affirmation also establishes (¶ 9) that the respondents also failed to comply with the AEP Order to Correct, which requires them to "perform pointing, upgrade and re-wire the building's electrical system, and replace the roof." Pursuant to the Consent Order, Respondents were to complete this work by August 31, 2016. Id. Furthermore, the building's heating system had to be replaced by HPD. Id.

14. Much of the harm caused by the Debtor's actions since it acquired the Property cannot be undone. The tenants and residents at the Premises have had to live and continue to live in uninhabitable conditions with no heat, hot water, gas, in danger of fire and explosions, with children testing positive for lead poisoning. And despite their agreement to correct the violations and the entry of several court orders this Debtor, Miller and their management companies continue to flaunt the law and disregard mounting civil penalties

intended at bringing compliance with Housing Code Violations. Unfortunately, this appears to be the Debtor's and Seth Miller's "modus operandi" with respect to other properties as well, not just the Premises. See e.g., New York Times article dated May 2, 2015 (annexed hereto as **Exhibit D**) reporting that Hon. Marina Cora Mundy issued a decision holding the landlord Seth Miller in civil contempt for not providing essential services after agreeing to do so and ordering Mr. Miller to pay $922,000 in accumulated fines and noting that, despite such fines, the buildings at 930 and 940 Prospect Place still had hundreds of violations. Similarly here, as reflected in the HPD proof of claim, $698,460 is owed HPD in civil penalties yet the Premises still had as of November, 2016 over 300 housing violations with over 100 immediately hazardous violations.

15. Despite this record, Seth Miller audaciously and outrageously asserts in his Affidavit Pursuant to Local Rule 1007 filed on January 10, 2017 (ecf # 5) that the reason it has removed the tenants' 7A Petition to this Court is because the tenants are "seeking to interfere with, and disrupt, the Debtor's ability to complete necessary repairs and maintain the Real Property" and dares to accuse the tenants of having "nefarious reasons" for bringing a 7A Petition for the appointment of a 7A Administrator. Mr. Miller's assertions that he and the Debtor intend to make the necessary repairs are simply not credible. As set forth above, the Premises have been plagued by hundreds of violations (including Class C, immediately hazardous violations) for years and despite stipulations of settlements and consent orders, the Debtor and Mr. Miller failed to take the requisite action.

16. The only reason the Debtor filed for Ch. 11 and removed the 7A Petition is not to lose control over the Premises. RPAPL § 778 and the terms of the 7A orders appointing 7A administrators mandate how the 7A Administrator use rent money deposited with him/her

and require that such funds be applied first to pay for the work specified in the judgment, the 7A Administrator's reasonable expenses (including legal expenses) and then towards the payment of any outstanding City real estate taxes, emergency repair liens and other City liens. Only after all of these amounts are paid and only to the extent there is any "surplus" can such surplus be paid to the owner of the Premises. Landlords such as Mr. Miller, who use various corporate entities to "invest" in residential buildings but refuse to abide by their statutory obligation to maintain such properties in compliance with applicable municipal codes and choose instead to inflict harm on the residents of the Premises should no longer be in control of their Premises.

17. Pursuant to applicable state law, jurisdiction over housing matters resides with the Supreme Court and Civil Court of the State of New York. The Civil Court was given jurisdiction over Article 7A proceedings in 1965 under the N.Y.C. Civ. Ct. Act § 204. That jurisdiction was continued and broadened in 1972 with the creation of a "Housing Part". See Rothbaum v. Ebel, 77 Misc.2d 965, 354 N.Y.S.2d 545 (NY Civ. Ct. 1974), referring to N.Y.C. Civ. Ct. Act § 110[a][5], [c]. "The broad grant of jurisdiction to [the Civil Court] was an implementation of the legislative finding that 'effective enforcement in the city of New York has been hindered by the dispersion of prosecutions, actions and proceedings to compel compliance with housing standards among a number of criminal and civil courts, so that no single court has been able to deal consistently with all of the factual and legal problems presented by the continuing existence of housing violations in any one building." See Mark v. William Muschel, Inc., 135 Misc.2d 804, 516 N.Y.S.2d 1015 (NY Civ. Ct. 1987), citing L. 1972, ch. 982, § 1. See also Kirsh v. City of New York, 1995 U.S. Dist. Lexis 16983 (S.D.N.Y. Nov. 15, 1995) at pp. *8 through *10 of the Lexis opinion, describing the legislative history of Article 7A and the need

for the appointment of Article 7A administrators particularly in "highly urbanized communities" such as New York City.

18. Not only is statutory jurisdiction over housing matters in Housing Court, see RPAPL § 778(1), N.Y.C. Civ. Ct. Act § 110(p), Kirsh v. City of New York, et al., 94 Civ. 8489, 1997 U.S. Dist. Lexis 9659 (S.D.N.Y. July 2, 1997), aff'd. mem., Kirsh v. City of New York, 159 F.3d 1347 (2d Cir. 1998), cert. denied, 525 U.S. 1054, 119 S. Ct. 617, 142 L.Ed.2d 557 (1998), but RPAPL § 778(1) specifically authorizes the Civil Court to appoint an Article 7A administrator for the property in need of housing rehabilitation with the duties and obligations set forth therein. An Article 7A administrator acts as a fiduciary for the tenants and is not a receiver. See Kirsh v. City of New York, 1997 U.S. Dist. Lexis 9659 (S.D.N.Y. July 7, 1997), at p. *19 of the Lexis opinion, supra.

19. The 7A Administrator's actions are subject to Housing Court's supervision. "Improprieties or illegalities in his administration, if any, can be handled by the appointing court or other appropriate authority." In the Matter of Kennise Diversified Corp., 34 B.R. 237, 245-46 (Bankr. S.D.N.Y. 1993); RPAPL § 779. Chase Group Alliance LLC v. City of New York, 2009 U.S. Dist. Lexis 51248 (S.D.N.Y. 2009), aff'd, 620 F.3d 146, 149 (2nd Cir. 2010) (affirming dismissal of procedural due process claims and noting that the 7A Administrator's authority in borrowing funds from HPD which led to the imposition of liens was statutory and undertaken "in accordance with the direction of the court.")

20. In the companion cases of In re LKH Assets LLC and In re AI Holdings LLC, Ch. 11, Case Nos. 07-12691 and 07-12692 (Bankr. S.D.N.Y. 2007), Hon. Robert Gerber had the opportunity to address similar issues as those present in this case. After holding an emergency evidentiary hearing, Judge Gerber found the Debtors' Chapter 11 cases to be

"abusive", lifted the automatic stay and subsequently dismissed the cases.[1] As here, the Debtors' primary assets were apartment buildings and the HPD and the tenants had been litigating against the Debtor, its principal and management company in an effort to correct numerous housing court violations. As here, the Chapter 11 cases had been filed on the eve of a trial scheduled to take place in Housing Court for the appointment of a 7A Administrator. In that case, the state court judge had set the cases down for a trial on all issues regarding the violations, civil penalties and the appointment of a 7A Administrator to begin on September 24. Those debtors sought bankruptcy protection one month earlier. Judge Gerber stated:

> I find that the timing of the combination of Judge Jackman-Brown's announcement and the debtor's filing was not coincidental and find that these cases were filed for the purpose of blocking the appointment of an article 7A administrator. I note that the appointment of an article 7A administrator would not deprive the debtors of ownership of their property as a mortgage foreclosure would but it would result in the debtor's principal's loss of control over the debtor's properties until the necessary repairs were made which might take quite a while. ...Thus, after hearing the evidence, I find that the debtor's principal's real concern in filing these Chapter 11 cases was stopping the trial before Judge Jackman-Brown and using the time in Chapter 11 to block litigation against the debtors and particularly to forestall appointment of an article 7A administrator while continuing to defer making repaird for an even longer time....

Id. at pp. 204-205. (A copy of the Court's decision read into the record at the end of the evidentiary hearing held on October 2, 2007, pp. 199-230 of the transcript, ecf # 48, is annexed hereto as **Exhibit E.**).

[1] While the City is not presently seeking a dismissal of the Chapter 11 case, it contemplates filing such motion subsequently and/or joining in the motion to dismiss and/or lift the automatic stay, as well as for a remand of the 7A Petition removed by the Debtor to the District Court, anticipated to be filed by the Urban Justice Center on behalf of the tenants of the Premises.

21. Judge Gerber stated as follows with respect to HPD's motion declaring the automatic stay inapplicable to the continuation of its comprehensive case for lack of heat, hot water and enforcement of the Housing Maintenance Code:

> …I confirmed that HPD could proceed in the [Housing Court] … because, as I noted at the outset of this decision, governmental entities are subject to the police power exception to the automatic stay under Bankruptcy Code Section 362(b)(4) and may proceed with actions or proceedings necessary to protect the public health or safety without first having to seek relief from the stay.

Id. at p. 205.

22. Judge Gerber also concluded that permitting the pre-petition state court proceedings to continue without delay, despite the Ch. 11 filing, served the interests of judicial economy:

> The interests of judicial economy and the expeditious and economical resolution of the litigation would clearly be well served, and in my view best served, by permitting that state court to continue on with its previously scheduled proceedings and not to allow all of the effort it has put into these cases so far to go to waste or to require the claims of HPD to go forward without the very closely related claims of the tenants to go forward at the same time."

Id. at 221.

23. In applying the Sonnax factors to HPD's and the tenants' lift stay and dismissal motions, Judge Gerber also acknowledged the specialized knowledge of the Housing Court with respect to housing court matters, including the appointment of a 7A Administrator. He stated as follows:

> Factor four, whether a specialized tribunal with the necessary expertise has been established to hear the cause of action. Under the facts of this case, this is a plainly relevant factor, a factor of extraordinary importance that dramatically and heavily weighs in favor of relief from the stay. The claims against the debtor in this case sound primarily, if not entirely in state law, specifically in the area of landlord/tenant rights and the rights of regulatory entities

> such as HPD incurred as bodies such HPD [sic] to implement their statutorily mandated functions. New York State has established special courts to hear matters of this character whose judges have extraordinary experience and expertise in deciding matters of this character. As I found in my findings of fact, it could hardly be disputed that judges like Judge Jackman-Brown are far better trained, experienced, and comfortable in addressing these matters and bankruptcy courts are not. There is a reason why matters like this are brought to the same courts in the state system. And that is, of course, their experience and expertise and mechanisms for determining matters of this character. Even if this had not been an abusive filing, if by way of example the proceedings before the state court had been removed by the debtors to be heard as adversary proceedings in the bankruptcy court, a case of this character would be a classic one for either discretionary or mandatory abstention.

Id. at pp. 219-220. (Emphasis added) (Copies of the Order Granting Relief from the Automatic Stay with Respect to Certain Actions Brought by Tenants and the City of New York signed on October 5, 2007 (ecf # 46) and of the subsequent Stipulation and Order Dismissing Bankruptcy Cases signed on October 15, 2007 (ecf # 49) are collectively annexed hereto as **Exhibit F**).

24. The issue of the appointment of an Article 7A Administrator was also considered by Judge Lane in In In re Dinos Corp., Case No. 13-13333 (SHL) (Bankr. S.D.N.Y. 2013). In that case, a 7A Administrator had been appointed pre-petition and had been operating the property for many years. The Debtor had failed to fully disclose all applicable facts and filed an order to show cause and a proposed plan and disclosure statement premised on the false assumption that, upon filing for Ch. 11 relief, the newly incorporated debtor would be able to discharge the 7A Administrator, take control over the property, avoid paying the $1.3 million in emergency repair and other liens and collect rents without rehabilitating the Property or paying the estate creditors.

25. In its response, the City argued that the 7A Administrator appointed pre-petition was not a "custodian" within the meaning of 11 U.S.C. § 543(b) required to turn over the

property or its rental income to the debtor and that the debtor's single asset real estate case had been filed in bad faith for the obvious purpose of improperly seeking a discharge of the 7A Administrator and circumventing the Housing Court injunction set forth in the existing 7A Order which prohibited interference with the 7A Administrator's possession and control of the Property. Dinos subsequently withdrew its application for the removal of the 7A Administrator and the hearing on the approval of its disclosure statement was adjourned sine die. The case was subsequently dismissed by Order entered on April 30, 2014 (ecf # 43) (copy annexed as **Exhibit G**) and the Article 7A Administrator remained in control of the property. Judge Lane agreed with and followed Hon. Beatty's decision in In re Kennise Diversified Corp., 34 B.R. 237 (Bankr. S.D.N.Y. 1993), supra, which held that the 7A Administrator was not a custodian and that the purpose of a 7A appointment is specifically to use the rents of the property – as required by Article 7A – to remedy conditions dangerous to life, health and safety at the property.

26. This Debtor similarly sought this Court's protection and filed the Notice of Removal of the 7A Petition to avoid the appointment of the 7A Administrator at the trial scheduled for that purpose on January 26, 2017 and prevent the 7A Administrator from collecting and applying the rents first and foremost towards the remediation of the uninhabitable conditions at the Premises. Once a 7A Administrator is appointed, the Debtor can no longer collect the rents and refuse to cure the housing violations and pay for the existing emergency repair and other liens.

27. The Debtor and Miller should not be permitted to continue to disregard court orders and flaunt their statutory obligations as owners to maintain their Premises in accordance with the applicable Housing Maintenance Code to the prejudice of the tenants and residents of the Premises and the City of New York that is required by law to step in and expend

funds, impose liens for emergency repairs and tenant relocations. The tenants and residents of the Premises should not continue to live without heat, hot water, gas, in danger of gas explosions, with obstructed fire escapes and children getting sick from lead poisoning in roach and rodent infested premises. These matters are better left to the specialized expertise of the Housing Court judges appointed for that purpose, as found by Judge Gerber in LKH Assets LLC and AI Holdings LLC, supra. Accordingly, this Court should abstain from hearing the 7A Petition removed to the District Court and remand the case back to the Housing Court.

28. No prior application for the relief set forth herein has been made. The City hereby requests that the requirement for filing a separate memorandum of law be waived.

WHEREFORE, for all of these reasons, and in order to prevent further harm to the health, safety and welfare of the tenants and residents at the Premises owned by the Debtor and Miller, the City requests an order declaring the automatic stay inapplicable and/or lifting the automatic stay with respect to HPD's contempt motion (currently returnable on January 26) and the continuation of HPD's comprehensive case against the Debtor and Miller in the Housing Court pursuant to the governmental unit's police power exception to the automatic stay set forth in Section 362(b)(4). The City also joins in the Urban Justice Center's anticipated motion to dismiss and/or lift stay and for a remand of the 7A proceeding back to state court so that both HPD's motion and the trial of the 7A Petition can proceed, as scheduled, and without further delay in Housing Court on January 26, 2017. Both matters are before the same Housing Court judge.

Dated: New York, New York
January 18, 2017

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